Supreme Court, U.S.
FILED
JAN 27 2015
OFFICE OF THE CLERK

No. 14-46, No. 14-47 & No. 14-49

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF MURRAY ENERGY CORPORATION IN SUPPORT OF PETITIONERS

J. VAN CARSON
Counsel of Record
GEOFFREY K. BARNES
WENDLENE M. LAVEY
JOHN D. LAZZARETTI
ROBERT D. CHEREN
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8559
van.carson@squirepb.com

Counsel for Murray Energy

January 2015

CONTENTS

CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. EPA acts unreasonably when it refuses to consider an "important aspect of the problem." 5

II. The "problem" facing EPA was whether or not to regulate power plants under Section 112, or in some other way. 7

A. The nation's power plants evolved over decades of support and regulatory oversight by state and local governments taking into account differing local circumstances. 8

B. Regulating power plants under Section 112 supplants state and local governments' role with an inflexible and uniform standard. 11

C. Congress provided the flexible Section 111 program as an alternative to power plant regulation under Section 112. 14

D. EPA has acknowledged that it erroneously ignored Section 111 as an alternative for regulating power plant emissions. 16

III. Costs are an "important aspect" of the decision to regulate power plants under Section 112 or Section 111. 20

A. Costs are the principal difference between Section 111 and Section 112. 20

B. EPA's decision imposes significant costs on state and local providers of public power. 23

C. The Unfunded Mandates Reform Act of 1995 underscores the importance of costs in this case. 23

IV. EPA's refusal to consider costs renders its decision arbitrary and capricious. 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

FERC v. Mississippi
456 U.S. 742 (1982) 9

FPC v. East Ohio Gas Co.
338 U.S. 464 (1950) 8, 25

Garcia v. San Antonio Metro. Transit Auth.
469 U.S. 528 (1985) 24

General Motors Corp. v. Tracy
519 U.S. 278 (1997) 9

Motor Vehicle Mfrs. Ass'n v. State Farm
463 U.S. 29 (1983) 3–6

New Jersey v. EPA
517 F.3d 574 (D.C. Cir. 2008) 18

Util. Air Regulatory Grp. v. EPA
No. 01-1074 (D.C. Cir. July 26, 2001) 17

Whitman v. Am. Trucking Ass'ns, Inc.
531 U.S. 457 (2001) 6

Statutes

Administrative Procedure Act
5 U.S.C. § 706(2)(A) 5

Clean Air Act Section 111
42 U.S.C. § 7411 ..... 14–15, 20–22

Clean Air Act Section 112
42 U.S.C. § 7412 ..... 2, 5, 7, 12–15, 22

Clean Air Act Section 307
42 U.S.C. § 7607(d)(9)(A) 5

1990 Clean Air Act Amendments Section 108(g)
Pub. L. No. 101-549, § 108(g)
104 Stat. 2399, 2467 (1990) 14

Unfunded Mandates Reform Act of 1995
2 U.S.C. § 1571(a)(4) 25

Federal Register Notices

65 Fed. Reg. 79,825 (Dec. 20, 2000) 16

69 Fed. Reg. 4,652 (Jan. 30, 2004) 17

70 Fed. Reg. 15,994 (Mar. 29, 2005) 6, 17, 21

76 Fed. Reg. 24,976 (May 3, 2011) 8, 18–19, 26

77 Fed. Reg. 9,304 (Feb. 16, 2012) 9, 23–24

Other Authorities

136 CONG. REC. 3,493 (1990) 14

H.R. REP. NO. 104-76 (1995) 25

S. REP. NO. 104-1 (1995) 23–24

Joint Hearing on S. 1 Before the S. Comm. on Governmental Affairs and the S. Comm. on the Budget, 104th Cong. 61 (1995) 24

THE POWER INDUSTRY AND THE PUBLIC INTEREST (1944) 9

Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*
32 NAT. RES. J. 289 (1992) 9

Petition for Review, *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. Feb. 16, 2001) 16

Statement of Issues, *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. Mar. 26, 2001) 16

INTERESTS OF THE *AMICUS CURIAE*

Murray Energy Corporation ("Murray Energy") respectfully files this brief in support of Petitioners.*

Murray Energy is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing roughly 7,500 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy produced approximately 63 million tons of coal from twelve active coal mining complexes in six states. Murray Energy also owns two billion tons of proven or probable coal reserves in the United States.

Murray Energy sells coal to public and private power plants. Affordable and reliable power, much of which is generated by coal, remains essential to the health of our nation's economy. Murray Energy and its employees proudly serve their customers that provide this essential service.

In developing the current Section 112 program as part of the Clean Air Act Amendments of 1990, Congress recognized the drastic consequences that would occur from subjecting the nation's power plants to inflexible Section 112 standards. Instead of automatically authorizing or requiring imposition of the Section 112 program on power plants, Congress directed the Environmental Protection Agency ("EPA")

---

* No counsel for any party authored any portion of this brief. No person or entity other than Murray Energy made any monetary contribution to the preparation and submission of this brief. Murray Energy obtained consent to the filing of this brief.

to complete a detailed study of emissions from power plants and then to regulate them under Section 112 only if "appropriate and necessary" to do so. 42 U.S.C. § 7412(n)(1)(A). But when EPA undertook the required "appropriateness" analysis, the agency refused to consider the costs of such regulation on the nation's power sector, while at the same time estimating — as it was required to do pursuant to the Unfunded Mandates Reform Act of 1995 — that regulating power plants under Section 112 would cost $9.6 billion per year.

EPA's decision to regulate power plants under Section 112 will have a dramatic effect on the power sector and those who supply the fuel to be converted to electricity at those power plants, including Murray Energy and other coal companies.

Murray Energy supports the Opening Briefs of Petitioners, but offers this Amicus Brief in order to present in greater detail why EPA's determination under Section 112(n)(1)(A) was arbitrary and capricious. By refusing to consider costs, EPA ignored an important aspect of the regulatory choice it faced. Indeed, once Section 112(n)(1)(A) is fully understood, it is evident that EPA ignored the most important factor that would otherwise inform that choice.

SUMMARY OF THE ARGUMENT

For over a century, state and local governments have constructed and supported power plants in order to provide affordable and reliable electric power. These power plants are as diverse in size and age as the states themselves and also vary widely in design.

Applying Section 112 of the Clean Air Act forces all existing power plants to either equal the emission levels achieved by a small set of the nation's best-performing facilities or else shut down completely. Section 112 also prohibits the construction of any new power plants unless they match the emission levels achieved by the nation's very best power plant. These requirements are imposed without regard to costs, energy requirements, or local resources.

Mindful that regulating power plants under Section 112 might well be a costly mistake, Congress ordered EPA to do so only after first evaluating the degree of health impacts from power plant emissions in light of all other Clean Air Act requirements, and then to subject power plants to Section 112 only after deciding that regulation under Section 112 was still "appropriate and necessary."

As an alternative, Congress provided Section 111 of the Clean Air Act. Section 111 is a more flexible program that considers costs, energy requirements, and the remaining useful life of existing sources. Section 111 provides a greater role for the states by tasking them with setting standards for their own existing facilities rather than imposing a uniform nationwide standard set by EPA.

As held by this Court, EPA acts arbitrarily and capriciously when it fails "to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In this case, the "problem" facing EPA is the regulatory decision as to whether or not to regulate power plants under Section 112, recognizing that Congress provided an alternative in Section 111. The key difference between the Section 111 and Section 112 programs is, in fact, costs. Yet EPA has refused to consider the $9.6 billion in annual costs it estimates would result from subjecting power plants to the inflexible Section 112 program.

This refusal renders EPA's decision to regulate power plants under Section 112 arbitrary and capricious. Accordingly, the Section 112 rule — and the determination on which it was based that it was "appropriate" to regulate power plants in this manner — must be vacated.

ARGUMENT

I. EPA acts unreasonably when it refuses to consider an "important aspect of the problem."

In 1990, Congress tasked EPA with determining if the Clean Air Act's Section 112 regulatory program was appropriate for power plants. 42 U.S.C. § 7412(n)(1)(A). The Clean Air Act provides for judicial review of this determination to ensure it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This is the same standard as that found in the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

This "arbitrary and capricious" standard demands that, in making its decision, EPA "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). Moreover, EPA's determination is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem*, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (emphasis added).

EPA acknowledges that it did not consider costs when deciding to subject power plants to the Section 112 program, notwithstanding the $9.6 billion annual cost the agency has estimated will result from its decision with virtually no offsetting benefits.

In fact, EPA agrees that it *could* have considered costs, but *chose* not to do so.

Thus, whether EPA acted arbitrarily and capriciously in determining that power plants should be regulated under Section 112 hinges on whether costs were an "important aspect of the problem" before the agency.[1] This question cannot be answered without first understanding the "problem." When the "problem" is properly understood, it is clear that costs are an "important aspect" of that problem.

---

1. Whether Congress has intended to prohibit consideration of a factor, *see State Farm*, 463 U.S. at 43, is a statutory interpretation question governed by the familiar *Chevron* analysis. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 471 (2001) (applying *Chevron* to determine that Congress intended to prohibit cost consideration under another section of the Clean Air Act). In this case, Congress has not done so. EPA recognized in 2005 that consideration of cost was not prohibited. *See* 70 Fed. Reg. 15,994, 16,001 n.19 (Mar. 29, 2005) ("Nothing precludes EPA from considering costs in assessing whether regulation of Utility Units under section 112 is appropriate in light of all the facts and circumstances presented."). And the Solicitor General has indicated that EPA is not now advancing a contrary view. EPA Opp. at 2 (stating that "EPA declined to consider costs when making th[e] determination"). Were EPA to now reject its 2005 position, it would propound an unreasonable interpretation of the meaning of the statute that would be rejected under *Chevron*.

II. The "problem" facing EPA was whether or not to regulate power plants under Section 112, or in some other way.

Section 112(n)(1)(A) is a special provision that applies only to "electric utility steam generating units" (referred to herein as "power plants"). 42 U.S.C. § 7412(n)(1)(A); 42 U.S.C. § 7412(a)(8).

Under this provision, Congress directed EPA, first, to undertake a study of the public health hazards reasonably anticipated to occur as a result of hazardous air pollutant emissions by power plants "after imposition of the requirements of this chapter." 42 U.S.C. § 7412(n)(1)(A).[2] Second, EPA was to present the results of the study, including a description of alternative control strategies for emissions found to warrant regulation "under this section." *Id.*[3] Then, and only then, Congress directed EPA to "regulate electric utility generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph." *Id.*

EPA has erroneously defined the regulatory question — or "problem" — as whether or not to regulate harmful power plant emissions "at all." *See*

---

2. This "chapter" refers to Chapter 85 of Title 42 of the United States Code, which is the entire body of Clean Air Act programs.

3. This "section" refers to Section 112 of Chapter 85 of Title 42 of the United States Code, which establishes the framework for addressing hazardous air pollutants.

76 Fed. Reg. 24,976, 24,989 (May 3, 2011).[4] However, the problem is not *whether* any harmful power plant emissions are to be regulated "at all," but *how* they are to be regulated.

By misapprehending the problem, EPA ignored the issues specific to power plants addressed by Section 112(n)(1)(A). Yet, it is only with an understanding of Section 112(n)(1)(A) that "important aspects" of the decision to be made under this provision can be identified.

A. *The nation's power plants evolved over decades of support and regulatory oversight by state and local governments taking into account differing local circumstances.*

The nation's power industry is the product of a century of efforts to provide affordable and reliable electricity, much of which was pioneered by states and local governments building and supporting the construction of public and private power plants. These efforts have resulted in a diverse fleet of power plants that vary significantly in size, age, cost of operation, fuel costs, and efficiencies.

The Court has long recognized these pioneering efforts. As Justice Jackson stated, "[l]ong before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences." *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting); *see*

---

4. EPA's erroneous statement of the problem was then adopted by the court below. Op. at 28 (quoting 76 Fed. Reg. at 24,989).

also FERC v. Mississippi, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in judgment and dissenting in part) ("Utility regulation is a field marked by valuable state invention.").

Indeed, nearly all power plants in this country, both public and private, are the result of significant state and local government efforts. Many were directly constructed by state and local governments. Most others owe their economic feasibility to a "regulatory compact" with the states. In exchange for territorial monopolies that protect their investments and provide the degree of certainty necessary for enormous capital outlays, private power utilities are intensely regulated by state commissions that determine what prices they charge and what power plants they build. Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RES. J. 289, 289–90 (1992); *see generally General Motors Corp. v. Tracy*, 519 U.S. 278, 288–90 (1997) (citing Swartwout's article while discussing state regulation of utilities).

This important legacy of state initiative is especially evident in the public power sector that provides electricity for communities previously unserved or underserved by private utilities. *See* THE POWER INDUSTRY AND THE PUBLIC INTEREST 104 (1944) ("Between 1882 and 1927 most municipal systems were operating in communities never before served by private companies."); 77 Fed. Reg. 9,304, 9,440 (Feb. 16, 2012) (estimating "80 municipalities, 5 states, and 11 political subdivisions" are currently operating large power plants that would be subject to regulation under Section 112).

Moreover, utility investments in power plants are closely supervised by state commissions that must ensure the investment decisions are made primarily for the benefit of users of electricity by keeping costs as low as possible. This supervision covers the decision where and when to build a new power plant, the determination of its design, the decision whether any upgrades should be made, and the decision when it should be retired and replaced. In order to ensure that electricity costs are minimized for users, each of these decisions is influenced by local conditions such as the availability of local fuel sources.

For example, some states have older fleets because they are closer to coal resources and enjoy lower fuel costs such that investing in new plants does not offer the same return as in states that have much higher fuel costs. Other states have been able to avoid requiring expensive scrubbers on every coal power plant while nevertheless achieving national ambient air quality standards and complying with the provisions of the Title IV acid rain program, largely through the use of locally available low sulfur coal.

Given the traditional and ongoing role of states in cultivating and overseeing the nation's power generation industry, it is no surprise that power plants are diverse in design, size, and age. This diversity is no accident — it is a central feature of the federal system. As with many issues they address, state and local governments have responded to differing local circumstance with decades of decisions that have tailored their power generation fleets accordingly.

B. Regulating power plants under Section 112 supplants state and local governments' role with an inflexible and uniform standard.

In light of this variability, Congress has shown understandable caution in implementing national emission standards for power plants.

At the same time that the current version of Section 112 was being developed, for example, much effort was spent developing a national cap and trade program to address acid rain concerns to avoid imposing uniform national sulfur dioxide standards on power plants. The acid rain program, which was established by Title IV of the 1990 Clean Air Act Amendments, was designed to give power plants the choice among spending millions of dollars to install scrubbers, or using more lower-sulfur coal, or purchasing emission "credits" in a marketplace, rather than require every power plant in the nation take the same steps to reduce the acid rain problem.[5]

Section 112 threatens to be equally inappropriate for power plants as Title IV would have been had that program imposed one-size-fits-all standards. This is because Section 112 would require that EPA mandate potentially drastic emissions standards at great cost and for little benefit, without regard for differences in power plant performance that reflect differing local circumstances. Specifically, Section 112

---

5. The market-based credit system ensures that facilities can operate with existing controls without gaining a competitive advantage over those capable of cost-effectively achieving lower rates of emissions.

requires existing sources in categories or subcategories with more than 30 sources to achieve emission standards that are no "less stringent than the average emission limitation achieved by the best performing 12 percent of the existing sources." 42 U.S.C. § 7412(d)(3). Thus, by design, subjecting power plants to Section 112 indiscriminately forces many existing power plants to shut down. They have to either upgrade to match the performance of the highest performing facilities in the nation or stop operating. There is no opportunity to consider costs, the age of the facility, or the needs of the community. This consequences-blind mandate to match the performance of the highest performing power plants takes no account of the diversity of power plants built and maintained to address differing local circumstances. As a result, for many power plants, this mandate offers no choice at all — Section 112 regulation of power plants is a death sentence.

Section 112 also strips the state commissions of their traditional authority to tailor new power plants to local circumstances in order to minimize electricity costs for users. Every new power plant must be designed to meet emission standards that are no "less stringent than the emission control that is achieved in practice by the best controlled similar source." *Id.* In other words, any new power plant must match the performance of the best-performing power plant in the nation, again regardless of costs, energy requirements, or local needs.

The result is that, under Section 112, states that face higher fuel prices and have accordingly built the more expensive power plants required to minimize electricity costs for their citizens will now set a uniform performance standard for power plants in

other states. But these other states have built and preserved less expensive power plants because doing so is the best way to minimize electricity costs for their citizens given their differing local conditions. By imposing a uniform consequences-blind standard for every new and existing power plant, Section 112 will force these states to depart from the tailored cost-minimizing electricity generation systems by scrapping many of their existing power plants and either buying power from other states or devoting hundreds of millions of dollars on new power plants, upgrades to existing power plants, or retrofitting power plants to accept alternative fuels. To put the matter simply, a lot of people are going to have to pay a lot more for their electricity if power plants have to meet a rigid Section 112 standard.

Furthermore, regulating power plants under the Section 112 program threatened to combine with the Title IV program to produce a grossly inefficient and unjustifiable result — a mandate to spend billions of dollars to install scrubbers after first having to purchase emission credits to avoid the cost of installing these same scrubbers and to subsidize the cost of installing them on competitors. So long as just 12 percent of the industry has installed scrubbers, the emission limitation they achieve for acid gases will be the "emission limitation achieved by the best performing 12 percent of the existing sources" in the category and every existing power plant in the nation must match this level of performance or shut down. 42 U.S.C. § 7412(d)(3). This aspect of Section 112 regulation alone will force closure of many power plants and force many others to spend billions of dollars to install scrubbers without any benefits to public health or the environment to show for it.

As stated by one legislator: "The basic concern" in considering whether to subject power plants to Section 112 regulation is that "certain otherwise 'clean' utilities might be forced to install scrubbers even where "[s]uch 'scrubbing' would increase power rates, while potentially providing little or no public health benefit." 136 CONG. REC. 3,493 (1990) (statement of Sen. Steven Symms) (quoting staff memorandum).

C. Congress provided the flexible Section 111 program as an alternative to power plant regulation under Section 112.

In light of the enormous costs of Section 112 for power plants, the potentially inconsistent treatment of power plants under the Acid Rain Program and Section 112, and the significant state role in assuring a diverse fleet of local power generation facilities that meets local demands cost-effectively, Congress in 1990 provided an alternative program to regulate any sources whose emissions "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" — Section 111. 42 U.S.C. § 7411(b)(1)(A). This included regulation of new sources under Section 111(b) and regulation of existing sources under Section 111(d). 42 U.S.C. § 7411(b); 42 U.S.C. § 7411(d).

The existence of Section 111 as an alternative to regulate power plant emissions is no happenstance. In the very legislation enacting Section 112(n)(1)(A), Congress included an amendment to provide for the regulation of existing sources under Section 111(d) if they were not regulated under Section 112. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).

Without that key amendment, Section 112(n)(1)(A) would have required EPA to decide whether to regulate some emissions from existing power plants at all, because Section 111(d) would have excluded the pollutants listed for regulation under Section 112.[6] The amendment assured that Section 111 could be used to regulate any harmful power plants emissions that could be regulated under Section 112 if EPA found Section 112 inappropriate or unnecessary.

Thus, through Section 112(n)(1)(A), Congress gave EPA the choice whether to subject power plants to Section 112 or Section 111. The decision Section 112(n)(1)(A) required EPA to make — i.e., the "problem" confronting EPA — was not *whether* to regulate power plant emissions, as EPA claimed, but whether to use Section 112 or Section 111 to regulate them.

---

6. Prior to 1990, the Clean Air Act prohibited Section 111(d) regulation of the limited set of emissions that were regulated under the initially very narrow Section 112 program. *See* 42 U.S.C. § 7411(d) (1988); 42 U.S.C. § 7412(a)(1) (1988) (pre-1990 limitation on Section 112 regulation to those emissions "which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness"); 42 U.S.C § 7412 (post-1990 expanded authority for Section 112 regulation of those emissions "which present, or may present, a threat of adverse human health effects . or adverse environmental effects").

D. EPA has acknowledged that it erroneously ignored Section 111 as an alternative for regulating power plant emissions.

Over the last 14 years, EPA changed its mind a few times on whether or not Section 111 is an alternative to regulation of power plants under Section 112, a choice that in turn impacts whether costs are important in deciding if Section 112 regulation is appropriate. At first, EPA seemingly forgot about Section 111. A few years later, EPA acknowledged it had been mistaken in rendering a decision to regulate under Section 112 without recognizing the Section 111 alternative. More recently, EPA repeated its initial mistake, a mistake acknowledged by the Solicitor General in this case.

When EPA first set out to determine whether Section 112 is appropriate for power plants, the agency failed to consider costs, and did so without the benefit of notice and comment from the public. 65 Fed. Reg. 79,825 (Dec. 20, 2000). Following EPA's announcement of its assessment of the "appropriateness" of regulating power plants under Section 112, utilities filed a petition for review seeking an order for EPA to conduct the finding through rulemaking. Petition for Review, *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. Feb. 16, 2001). The utilities objected to EPA's failure to provide an opportunity for notice and comment. Statement of Issues ¶ 4, *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. Mar. 26, 2001). And they further pointed out that EPA had wrongly believed that the Section 112 program was the "sole source of regulatory authority for hazardous air pollutant emissions from coal- and oil-fired power plants." *Id.* ¶ 2.

EPA first responded by moving to dismiss the petition for review on the ground that even if the finding was either procedurally or substantively defective, it constituted a "listing" decision that, per a provision of Section 112, could only be challenged at the time standards for the category were issued, not when the listing was made. The D.C. Circuit Court of Appeals agreed and issued a per curiam order dismissing the petition. *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. July 26, 2001) (per curiam).

Subsequently, EPA concluded that it had erred by failing to recognize the Section 111 alternative Congress had provided for addressing the very same emissions that could be regulated under Section 112. EPA explained that it had found Section 112 appropriate and necessary "based solely on its belief, at the time, that there were no other authorities under the CAA that would adequately address Hg and Ni emissions" from power plants. 69 Fed. Reg. 4,652, 4,684 (Jan. 30, 2004). But after "conduct[ing] a more thorough review of the available authorities under the CAA," EPA had now "identified a viable statutory mechanism other than section 112" that could be used to "adequately address" power plant emissions: The Section 111 program. *Id.*

Having recognized the availability of Section 111, EPA found power plants should not be subject to Section 112 and accordingly proceeded with a rule to regulate power plants under Section 111 instead. 70 Fed. Reg. 15,994 (Mar. 29, 2005).

But when EPA promulgated the Section 111 rule for power plants and retracted the agency's flawed Section 112 appropriateness finding, certain stakeholders successfully challenged EPA's authority to

rescind the earlier finding. The court agreed that EPA itself could not accomplish a "delisting" of power plants by simply admitting its error. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Accordingly, the court of appeals vacated the revision of the finding and also EPA's Section 111 rule for power plants. *Id.* at 583.[7]

As a result of the court of appeals' decision, EPA was in an awkward position. Had EPA continued to acknowledge that the initial finding was erroneous because it was made in ignorance of the Section 111 alternative, EPA would have had to go through all the work of preparing and promulgating a Section 112 rule, finalize it, and then refuse to defend the finding on which it rested. This scenario did not occur, however, because EPA simply reverted to its initial mistake by once again failing to recognize the availability of Section 111, claiming that it was deciding whether to regulate power plants "at all." 76 Fed. Reg. at 24,989. On that basis, EPA defended the original finding's failure to consider costs and then went even further and affirmatively *refused* to consider costs.

In its brief to the court below defending this refusal to consider costs, EPA's counsel did not repeat — but also did not correct — this assertion that the agency had no alternative to Section 112 for regulating power plant emissions. As a result, the

---

7. The Court vacated the Section 111(d) guideline because EPA cannot regulate power plants or any existing source category under both Section 111(d) and Section 112. *Id.* The Court vacated EPA's Section 111(b) standard for new power plants on the basis that EPA would not have issued it without the Section 111(d) guideline. *Id.*

court below relied on the erroneous statement in its opinion upholding EPA's refusal to consider costs as reasonable. Op. at 28 (quoting 76 Fed. Reg. at 24,989). In support of several states' petition for certiorari challenging this decision, Murray Energy identified this error by EPA and the court below. Brief at 9.

In opposition to the petition for certiorari, the Solicitor General acknowledged that, as EPA had previously recognized, the agency had the alternative to use Section 111 to regulate power plants. EPA Opp. 7 ("In 2005 EPA concluded that it was instead appropriate to regulate power-plant mercury emissions through an alternative statutory authority, 42 U.S.C. 7411."). The Solicitor General did not dispute that the existence of the Section 111 alternative renders erroneous EPA's principal basis for refusing to consider costs, that EPA was deciding whether to regulate power plant emissions "at all."

III. Costs are an "important aspect" of the decision to regulate power plants under Section 112 or Section 111.

That the costs of Section 112 are enormous is not in dispute. EPA has projected that regulating power plants under Section 112 will impose far greater costs than any other category of sources that EPA has ever regulated under that program, an estimated $9.6 billion per year, nearly ten times more than every other Section 112 rule but one. It is difficult to imagine any decision-maker concluding that this unprecedented price tag ought not be considered before deciding it is appropriate to impose those costs.

However, it is the availability of the Section 111 alternative that underscores the importance of costs to the "problem" EPA seeks to address — costs are the principal difference between the two options. Additionally, the choice to use Section 112 comes at great cost to public power plants which, given the Unfunded Mandates Reform Act of 1995, surely is an "important aspect of the problem" for EPA to consider.

A. Costs are the principal difference between Section 111 and Section 112.

Section 111 is far more flexible and less costly than Section 112 because Section 111 would allow state and local governments to continue to tailor their power generation fleets to address differing local circumstances. Rather than mandate that EPA force all sources to match the performance of the top performing sources, Section 111 standards for new and existing sources must be designed with costs and energy requirements "take[n] into account." 42 U.S.C. § 7411(a)(1).

Crucially, Section 111 standards for existing sources are separately designed by the states for each state's own set of sources, not by EPA for every source in the category. 42 U.S.C. § 7411(d)(1)–(2). Furthermore, the states are authorized to account not only for the differences in their sources from other states, but differences in the lifespan of sources as well. The standards may "take into consideration the remaining useful life of the existing source" in order to limit the potential for stranded investments and wasteful retirements. *Id.*

EPA sets nationwide Section 111 standards for new sources, but these standards are not subject to a formula in which the single very best performing source automatically dictates the standard of performance for every new source in the nation, as is the case with Section 112. Rather, EPA must identify a standard that takes cost and other considerations into account. Accordingly, if the very top performing source in the nation is tailored to local circumstances that are very different from the rest of the country, EPA can exercise its judgment not to set a lower standard of performance for other new sources.

EPA itself recognized the importance of cost in choosing between Section 111 and Section 112 as the method for regulating power plants. Having admitted that it mistakenly overlooked Section 111 as a viable alternative to Section 112 in its earlier Section 112 rulemaking, EPA proceeded with a Section 111 rule instead. In doing so, EPA found that costs are an important aspect of the problem under consideration. 70 Fed. Reg. at 16,000–01 ("[I]t might not be appropriate if the health benefits expected as the result of such regulation are marginal and the cost of such regulation is significant and therefore

substantially outweighs the benefits. [S]ituation specific-factors, including cost, may affect whether it 'is appropriate' ").

While Section 111 offers the flexibility necessary for regulating a widely diverse source category like power plants without imposing unjustified costs and without eliminating the ability of states to respond to differing local circumstances, it nevertheless offers the ability to address all of the same public health and environmental concerns as Section 112 because the Section 111 program can be used to regulate at least as many substances as Section 112.[8]

Accordingly, the choice Congress tasked EPA to make between using Section 112 or Section 111 as the alternative does not require EPA to determine whether the public health and the environment will be protected. The choice is how it will be done, and that depends foremost on the costs of subjecting power plants to Section 112.

---

8. The opinion of the court below incorrectly implies that the substances listed by Congress for Section 112 regulation "cause, or contribute to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." Op. at 7. But that standard has been removed from the statute and replaced, as EPA conceded in its brief in opposition to certiorari, with a standard requiring only that the emissions "present a threat of adverse human health effects . . . or adverse environmental effects." 42 U.S.C. § 7412(b)(2); EPA Opp. at 2–3. This is similar to the standard in Section 111 that emissions must "endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

B. EPA's decision imposes significant costs on state and local providers of public power.

EPA estimates that subjecting power plants to Section 112 imposes "compliance costs greater than 1 percent of base generation revenue in 2016" on "42 government entities" that provide public power and of these "32 may experience compliance costs greater than 3 percent of base revenues." 77 Fed. Reg. at 9,439. All told, EPA estimates it will "impose approximately $294 million in annual direct compliance costs on an estimated 96 state or local governments." *Id.* at 9,440. Perhaps most significant, EPA projects that as a result of its decision to subject power plants to Section 112, "6 units owned by government entities are expected to retire" completely. *Id.* at 9,439.

Thus, the costs to public power providers further supports the conclusion that costs are an important aspect of the problem, and must be considered by EPA.

C. The Unfunded Mandates Reform Act of 1995 underscores the importance of costs in this case.

It was the states' concerns over precisely the kind of disproportional mandate resulting from Section 112 regulation of power plants that prompted states to exercise their political clout in Washington to obtain enactment of the Unfunded Mandates Reform Act of 1995. S. REP. NO. 104-1, at 2 (1995) ("State and local officials from all over the Nation came to Washington" and "conveyed a powerful message to Congress."). These officials demonstrated that EPA and other agencies had issued many regulatory mandates that imposed hundreds of millions of dollars in unjustified costs.

The Mayor of Columbus, Ohio, noted in particular the concern that state and local officials could be "forced to raise utility bills to pay for" federal mandates when they had no means of assuring that these mandates would be "appropriate." S. REP. NO. 104-1, at 2 (1995). And in seeking the Mandates Act to redress this issue, the Governor of Ohio explained that the states were in part following the guidance from the Court, which, in holding that state and local governments have no regulatory immunity from unfunded mandates, essentially advised the states to work out their issues with Congress. *Joint Hearing on S. 1 Before the S. Comm. on Governmental Affairs and the S. Comm. on the Budget*, 104th Cong. 61 (1995) (testimony of Hon. Gov. George V Voinovich, on behalf of the National Governors' Association) (referring to *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985)).

As required by Section 202 of the Mandates Act, EPA calculated the costs of its decision to subject power plants to regulation under Section 112 will cost $9.6 billion per year. 77 Fed. Reg. at 9,439. EPA knew its regulatory decision would result in costs well over the statutory threshold of $100 million. In fact, EPA also calculated that nearly $300 million in costs would be imposed on state and local providers of public power. *Id.* at 9,440.

But EPA is refusing entirely to consider any of the information it was required by the Mandates Act to develop — and did in fact develop. Somehow, EPA concludes it was not an important aspect of its decision.

Importantly, while Congress did not specify in the Mandates Act what EPA was to do with the cost estimates it was required to develop, Congress did

provide that the cost estimate would be examined as part of the record for judicial review. *See* 2 U.S.C. § 1571(a)(4) ("Any information generated under" Section 202 of the Mandates Act "that is part of the rulemaking record for judicial review under the provisions of any other Federal law may be considered as part of the record for judicial review conducted under such other provisions of Federal law."); *see also* Conference Report on S. 1, H.R. REP. No. 104-76, at 45 (1995). This assuredly assumed that federal agencies would keep faith with the states by considering the results of the Mandates Act estimates at the very least in the rare circumstances where the estimates in fact demonstrate the kind of disproportionality in costs and benefits that the states had complained of before Congress.

EPA's conduct in this case announces to state and local governments that the millions in costs they must bear are irrelevant to the determination of the federal policies that impose them. The "observance of good faith with the states requires" that more than this blithe disregard of the Mandates Act estimates. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 490 (1950) (Jackson, J., dissenting).

IV. EPA's refusal to consider costs renders its decision arbitrary and capricious.

EPA's analysis of the appropriateness of using Section 112 to regulate power plants is as obviously unfinished as if the agency had prefaced its discussion with "On the one hand" without following it up with another, for EPA never weighs the health effects *against* any countervailing consideration. Yet at the outset of the Section 112 rulemaking, EPA admitted that applying Section 112 to power plants would transform the nation's power generation fleet. 76 Fed. Reg. at 24,979. By refusing to consider the costs, EPA failed to determine the wisdom of such a drastic reshaping of a core component of the nation's economy and the relationship between the states and the federal government, despite the command to take this step only if it was "appropriate."

Congress presented EPA with a decision to make pursuant to Section 112(n)(1)(A): Should power plants be regulated under Section 112? In presenting that decision to EPA, Congress was well aware of the regulatory alternative it provided in Section 111 for both new and existing power plants. While EPA forgot about this alternative authority for a period of time, the agency eventually recognized that the question under Section 112(n)(1)(A) calls for a choice between regulatory programs -- one of which is far more inflexible and costly than the other. EPA's refusal to consider costs, one of the most important aspects of making that choice, is arbitrary and capricious under the standard established in *State Farm*.

CONCLUSION

The judgment of the court of appeals should be reversed and EPA's determination that power plants could be appropriately regulated under Section 112 — together with the rule itself — should be vacated.

Respectfully submitted,

J. VAN CARSON
Counsel of Record
GEOFFREY K. BARNES
WENDLENE M. LAVEY
JOHN D. LAZZARETTI
ROBERT D. CHEREN
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8559
van.carson@squirepb.com
Counsel for Murray Energy

January 2015